

The Tricky Nature of Proving Genocide against Saddam Hussein before the Iraqi Special Tribunal

Michael J. Kelly

Follow this and additional works at: <http://scholarship.law.cornell.edu/cilj>

 Part of the [Law Commons](#)

Recommended Citation

Kelly, Michael J. (2005) "The Tricky Nature of Proving Genocide against Saddam Hussein before the Iraqi Special Tribunal," *Cornell International Law Journal*: Vol. 38: Iss. 3, Article 15.
Available at: <http://scholarship.law.cornell.edu/cilj/vol38/iss3/15>

This Comment is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell International Law Journal by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

The Tricky Nature of Proving Genocide Against Saddam Hussein Before the Iraqi Special Tribunal

Michael J. Kelly†

Introduction	983
I. Saddam's Iraq: Environment Ripe for Genocide?	986
II. Genocide of the Kurds	989
III. Genocide of the Marsh Arabs	995
IV. Saddam's Downfall and Indictment	999
V. The Iraqi Special Tribunal	1000
VI. Proving Genocide Against Saddam	1004
Conclusion	1010

Introduction

There is a small palm tree in a garden surrounded by walls near the airport in Baghdad. An elderly bearded man who has turned to writing poetry and reading the words of God in recent weeks goes out to the garden for an hour and a half in the morning and an hour and a half in the afternoon. He tends to the tree, putting stones around the base and making sure it has enough water to survive Iraq's midsummer.

When his hour and a half is over, Saddam Hussein goes back to his cell.

Once, he had dominion over all of Iraq. Now, he is stripped of all the riches and delusions; all he has left is a little time each day to cultivate a garden that isn't even his.¹

Saddam Hussein, the former Iraqi dictator, sits in solitary confinement under the care of U.S. military police awaiting trial by the newly minted Iraqi Special Tribunal (IST) for a laundry list of crimes committed during his thirty-three years in power. He was toppled by an American-led invasion in March 2003, and remained in hiding until discovered by U.S. forces in a six-foot underground "spider hole," armed only with a pistol that he declined to use.² He gardens while he waits for his trial.

† Associate Professor of Law, Creighton University. B.A., J.D., Indiana University; LL.M.-International and Comparative Law, Georgetown University. Professor Kelly was a contributor to the *Cornell International Law Journal's* Spring Symposium 2005 "Milošević and Hussein on Trial," and is author of *NOWHERE TO HIDE: DEFEAT OF THE SOVEREIGN IMMUNITY DEFENSE FOR CRIMES OF GENOCIDE & THE TRIALS OF SLOBODAN MILOSEVIC AND SADDAM HUSSEIN* (Peter Lang Publishers 2005).

1. Patrick Olsen & Chris Courtney, *Saddam's New Life: Poetry and Gardening*, CHI. TRIB., July 27, 2004, at 12.

2. *How Saddam Was Captured*, BBC NEWS, Dec. 15, 2003, http://news.bbc.co.uk/1/hi/world/middle_east/3317881.stm. U.S. President George W. Bush ordered invasion 38 CORNELL INT'L L.J. 983 (2005)

The charges against Saddam include war crimes, crimes against humanity, aggression, and genocide.³ While each of these long-recognized international crimes requires varying levels of proof and assertion unique to the specific crime or its sub-component, genocide is perhaps the trickiest of the lot, requiring not mere intent, but *specific* intent to destroy an identifiable group of people.⁴ Although it has been called the "crime of crimes" since the experience of the Holocaust, genocide has traditionally been the most difficult crime for prosecutors to prove.⁵

Formally outlawed in 1948, genocide has existed in practice from time immemorial. Indeed, multiple biblical references discuss its use as a war tactic against ethnically or religiously distinct cultures.⁶ It was known in the ancient world as a legitimate practice, used most famously by the Romans against Carthage.⁷ Throughout the Middle Ages and into the modern era, genocide was regularly practiced until the slaughter of the Armenians by the Ottoman Turks during World War I.⁸ International outrage at the atrocity moved world opinion toward condemning genocide, culminating in the adoption of the Convention on the Prevention and Punishment of Genocide ("Genocide Convention") in 1948 after World War II and the Holocaust.⁹

The Genocide Convention provides the definition of genocide that exists intact in many subsequent statutes, texts, and resolutions, including the statute establishing the IST:

of Iraq without U.N. Security Council authorization in order to disarm Saddam Hussein's regime, which was suspected of developing nuclear, chemical, and biological weapons in violation of international mandates. Jim Landers, *Adviser: WMDs Given Up by 1996 but Hussein Wanted to Rebuild Arms Program, Senate Panel Told*, DALLAS MORN. NEWS, Oct. 7, 2004, at 1A; Roy Eccleston, *Bush Ends the Search for WMD*, AUSTRALIAN, Jan. 14, 2005, at 1A. No such weapons have been found to date.

3. *Defiant Saddam Rejects Court, Charges*, CNN.COM, July 1, 2004, <http://www.cnn.com/2004/WORLD/meast/07/01/iraq.saddam/>. The seven acts substantiating Hussein's indictment are:

1. Anfal campaign against Kurds in the late 1980s;
2. Gassing Kurds in Halabja in 1988;
3. Invasion of Kuwait in 1990;
4. Crushing Kurdish and Shi'a rebellions after the 1991 Gulf War;
5. Killing political activists over thirty years;
6. Massacring members of Kurdish Barzani tribe in the 1980s; and
7. Killing religious leaders in 1974.

Saddam Trial Head Vows Justice, BBC NEWS, July 2, 2004, http://news.bbc.co.uk/2/hi/middle_east/3859007.stm.

4. Matthew Lippman, *Genocide: The Crime of the Century. The Jurisprudence of Death at the Dawn of the New Millennium*, 23 Hous. J. INT'L L. 467, 474, 485, 506-07 (2001).

5. WILLIAM A. SCHABAS, *GENOCIDE IN INTERNATIONAL LAW* 385 (2000).

6. Michael J. Kelly, *Can Sovereigns be Brought to Justice? The Crime of Genocide's Evolution and the Meaning of the Milosevic Trial*, 76 ST. JOHN'S L. REV. 257, 260-61 (2002).

7. *Id.* at 262-64.

8. *Id.* at 267-69.

9. *Id.* at 272-81.

[G]enocide means any of the following acts committed with intent to destroy, in whole or in part, a national, ethnical, racial or religious group, as such:

- (a) Killing members of the group;
- (b) Causing serious bodily or mental harm to members of the group;
- (c) Deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part;
- (d) Imposing measures intended to prevent births within the group;
- (e) Forcibly transferring children of the group to another group.¹⁰

The elasticity of the definition is deceptive. While many fact patterns may fit into the two required objective slots, namely, a protected group (e.g., racial) and an act of destruction (e.g., killing), the definition is silent as to just how widespread the acts must be. For example, do the acts have to be pervasive enough to constitute widespread destruction as required for a crime against humanity? Furthermore, most perpetrators go free on the prosecution's inability to prove the subjective element of intent.

Judicial and legal authorities have interpreted the intent required for genocide to be specific rather than general.¹¹ Varying rationales exist for this conclusion, but the higher threshold means more proof—proof that is almost invariably difficult to come by in the form of intercepted conversations, correspondence, or documents that demonstrate the perpetrator's state of mind at the time the genocide was carried out. Not all *genocidaires*, as genocide perpetrators are known, meticulously catalogue, index, and document their activities in excruciating detail as the Nazis did when carrying out Hitler's Final Solution. However, the International Criminal Tribunal for Rwanda (ICTR) determined in the 1999 case *Akayesu* that specific intent to commit genocide can be successfully inferred through context, thereby easing the way for this showing somewhat.¹²

Charges of genocide against General Radislav Krstić at the International Criminal Tribunal for the former Yugoslavia (ICTY) failed precisely because of the specific intent requirement. Krstić was convicted for the 1995 genocide that targeted and killed 8,000 Bosnian Muslims in Srebren-

10. Convention on the Prevention and Punishment of the Crime of Genocide art. 2, opened for signature Dec. 9, 1948, 102 Stat. 3045, 78 U.N.T.S. 277.

11. M. Cherif Bassiouni, *Observations Concerning the 1997-98 Preparatory Committee's Work*, 25 DENV. J. INT'L L. & POL'Y 397, 413 (1997) (indicating that the requirement for specific intent is a flaw in the definition of genocide).

12. *Prosecutor v. Akayesu*, Case No. ICTR 96-4-T, 1998 WL 1782077, Judgment, ¶ 523 (Sept. 2, 1998):

[I]t is possible to deduce the genocidal intent inherent in a particular act charged from the general context of the perpetration of other culpable acts systematically directed against that same group, whether these acts were committed by the same offender or by others. Other factors, such as the scale of atrocities committed, their general nature, in a region or a country, or furthermore, the fact of deliberately and systematically targeting victims on account of their membership of a particular group, while excluding the members of other groups, can enable the Chamber to infer the genocidal intent of a particular act.

ica, on a theory of joint criminal enterprise.¹³ However, his conviction was overturned by the Appellate Chamber which concluded that, although the Srebrenica genocide had occurred and others in the joint criminal enterprise shared a specific intent to carry it through, the evidence did not support the inference that Krstic had the required specific intent to destroy, rather than mere knowledge.¹⁴ It is because of this very high hurdle that Slobodan Milošević is likely to be found guilty of only complicity in genocide as opposed to genocide proper. Complicity only requires a showing of knowledge.

As for Saddam Hussein, he will probably be found at least complicit in the two genocides that occurred under his regime—the first against the Iraqi Kurds of the north, and the second against the Marsh Arabs of the south.¹⁵ Whether he will be successfully convicted for genocide remains an open question. The IST has no experience handling complex cases based on international criminal conduct; however, by the time of Hussein's trial, the tribunal may have developed that experience through trials of his henchmen.

I. Saddam's Iraq: Environment Ripe for Genocide?

The modern state of Iraq is an artificial creation. It was constructed by the British Foreign Office at the conclusion of World War I with an eye toward offsetting French influence in the Middle East. During the course of dismembering the defeated Ottoman Empire, the western powers also cobbled together Palestine, Syria, and Trans-Jordan. Iraq was the fusion of three Ottoman provinces: the Kurdish Sunni Mosul province, rich in oil reserves; the Arab Sunni Baghdad province, the administrative center; and the Arab Shi'a Basra province, also with oil wealth and a seaport.¹⁶ Britain served as the mandatory power under the League of Nations Mandate system, charged with the responsibility of bringing Iraq and its other "mandates" along the road toward independence.¹⁷

When Saddam took power in 1979, he was immediately confronted with the problem of successfully governing a multiethnic, multireligious state. Faced with the practical problem of consolidating power and governing Iraq, Saddam drew upon his cynical penchant for managing ethnic politics in a manner similar to that of Tito, Yugoslavia's longtime dictator. Like Tito, Saddam justified his iron-fisted rule as the only means of holding the conglomerate of ethnically and religiously diverse people together.

13. Prosecutor v. Radislav Krstic, Case No. IT-98-33-A, 2004 WL 2781931, Judgment, ¶ 3 (April 19, 2004), available at <http://www.un.org/icty/krstic/Appeal/judgment/krs-aj040419e.pdf>.

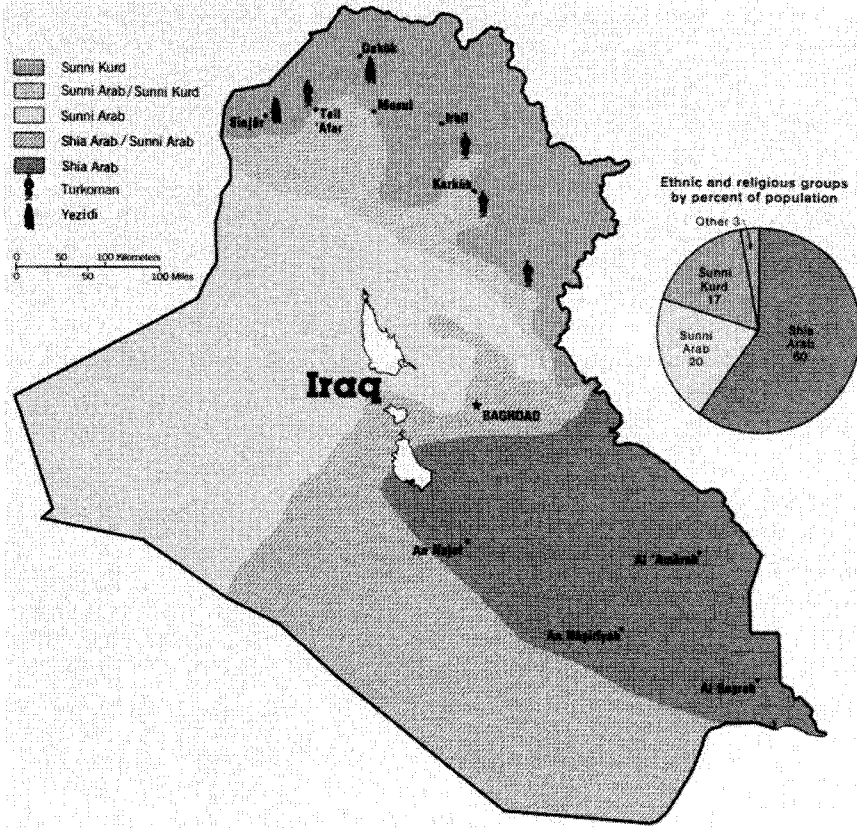
14. *Id.* ¶ 134.

15. FOREIGN & COMMONWEALTH OFFICE, SADDAM HUSSEIN: CRIMES AND HUMAN RIGHTS ABUSES 14-16 (2002).

16. MARGARET MACMILLAN, PARIS 1919, 395-409 (2001); Vera Beaudin Saeedpour, *Establishing State Motives for Genocide: Iraq and the Kurds*, in GENOCIDE WATCH 59, 67-68 (Helen Fien ed., 1992).

17. SIR ARNOLD T. WILSON, MESAPOTAMIA, 1917-1920: A CLASH OF LOYALTIES; A PERSONAL AND HISTORICAL RECORD 240-41 (1931).

Figure 1: Ethnoreligious Groups



Take that away, and Iraq, like Yugoslavia without Tito, might fly apart into its constituent pieces, melting down into civil war in the process. For years, the West turned a blind eye to the human rights situation in Iraq, encouraging instead the continued territorial integrity and stability of nation-states most of which they had helped to create.¹⁸

With tacit blessing from the West, Saddam was able to inflict grievous harm on those who opposed his regime in Baghdad. His own ruling clan within the Ba'ath Party was based in Sunni Islam—practiced by a minority segment of the total Iraqi population, which consists of twenty percent Sunni Arabs, seventeen percent Sunni Kurds, and sixty percent Shi'a Arabs. For this additional reason, Saddam followed the pattern of other ethnic minority governments in such states as South Africa, Rhodesia, Rwanda, and Burundi, in brutalizing his own people to remain in power.

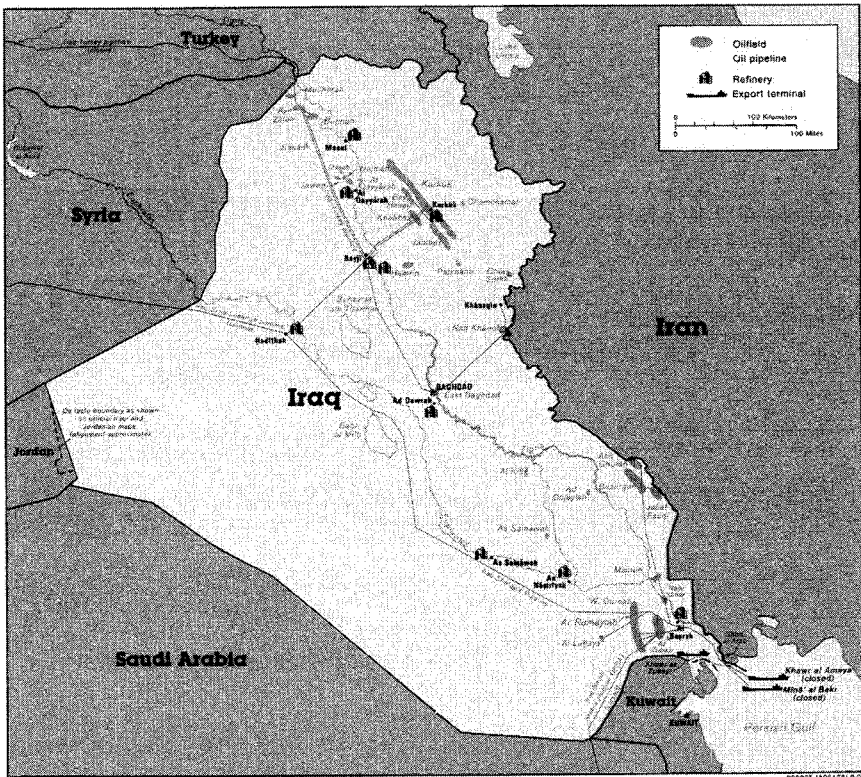
Underlying the political and power-based rationales for Saddam's approach to governance were the economic concerns. As Figures 1 and 2

18. DALE ANDERSON, *SADDAM HUSSEIN, A BIOGRAPHY* 19–20 (2004) (noting that European countries helped set up governments in a number of Arab nations after World War I).

indicate rather starkly, the distribution of oil wealth, Iraq's primary source of revenue, is inconveniently concentrated in the Kurdish and Shi'a regions of Iraq's north and south, with very little left in the Sunni Arab lands in the middle. The British recognized the value of the Kurdish area in the old Mosul province as the linchpin for Iraq's economy in as early as 1917, when Sir Arnold Wilson, acting commissioner for Mesopotamia, noted:

[T]he idea of Iraq as an independent nation had scarcely taken shape, for the country lacked homogeneity, whether geographical, economic or racial [I]t was scarcely to be hoped that the [v]ilayets of Basra and Baghdad could maintain their existence as an autonomous state without the revenue it was hoped might eventually be derived from the economic resources of the Mosul [v]ilayet. Yet three-quarters of the inhabitants of the Mosul [v]ilayet were non-Arab, five-eighths being Kurdish, and one-eighth Christians or [non-Islamic Kurds].¹⁹

Figure 2: Oilfields and Facilities



Consequently, to retain adequate control over the wealth of the nation, Saddam not only repressed the non-Sunni Arab populations in the north and south, but also repopulated many districts with his Arab kinsmen—

19. WILSON, *supra* note 17, at ix-x.

especially around the traditionally Kurdish area of Kirkuk. In the north, the "Arabization" of oil-producing areas meant eviction of Kurdish farmers, who were replaced with Arab tribesmen. Because the Iraqi Kurds were politically divided, Saddam could play the factions off one another in return for favors from Baghdad. He was able to take advantage of this disunity continually to keep them in check and eventually to eliminate large Kurdish populations altogether.²⁰

Despite such varied justifications, Saddam's principal tactic of imposing authority through terror went far beyond occasional arrests and executions of opponents. Although scores of Sunni Arabs fell victim to Saddam, the Kurds and Shi'a were his primary targets. In both instances, the calamities visited on these populations by Saddam's Sunni-dominant government in Baghdad occurred during or just after general warfare with a foreign power. As Christopher Greenwood, former counsel for Spain during General Pinochet's extradition hearings in London, noted in December 2003, Saddam can be held accountable for genocide at least against the Kurds in the north and the Shi'a Marsh Arabs in the south.²¹ The United States supports genocide prosecutions on both counts.²²

II. Genocide of the Kurds

Kurds, as a people, live in a divided world—some in Iraq, others in Iran, Syria, and Turkey. The frontier between Iran and Iraq to a large extent reflects the sixteenth-century collision of the expanding Persian and Ottoman Empires. A subsequent treaty between Persians and Turks formalized a mountainous border region that indiscriminately split Arabic Sunni and Shi'a as well as Kurdish populations on either side. This border survived both World Wars, but was adjusted under the 1975 Algiers Accords when Iraq's President Bakr ceded 518 square kilometers of oil-rich territory adjacent to the Shatt al-Arab to Iran in exchange for Iran's agreement to stop supporting Kurdish rebels in northern Iraq.²³

By 1979, however, the political landscape had changed dramatically. In Iraq, Bakr was dead, and Saddam had emerged as the undisputed strongman. In Iran, the Shah had fled the country, and the ayatollahs were completing their revolution amid continuing chaos. In the following year, having consolidated his power and eliminated any immediate threat from his enemies, Saddam sought to take advantage of the turmoil in neighboring Iran and restore the Iraqi lands lost under the Algiers Accords.

20. HUMAN RIGHTS WATCH, *MIDDLE EAST WATCH REPORT: GENOCIDE IN IRAQ: THE ANFAL CAMPAIGN AGAINST THE KURDS* (1993) [hereinafter HUMAN RIGHTS WATCH report], available at <http://hrw.org/reports/1993/iraqanfal/>. For further discussion of the discordant political entities of the Iraqi Kurds, see MICHAEL M. GUNTER, *THE KURDISH PREDICAMENT IN IRAQ: A POLITICAL ANALYSIS* (1999).

21. Christopher Greenwood, *Focus: The Trial of Saddam Hussein*, INDEPENDENT (London), Dec. 21, 2003, at 12.

22. Neil A. Lewis, *Iraqis Just Recently Set Rules to Govern Tribunal*, N.Y. TIMES, Dec. 15, 2003, at A16.

23. For a closer look at the history of the Kurds, see DAVID McDOWALL, *A MODERN HISTORY OF THE KURDS* (1996).

In September 1980, Iraq's army crossed into Iran, advancing to the outskirts of Abadan.²⁴ Ayatollah Khomeini used the invasion to in turn consolidate his own power and rally Iranians to defend their homeland. Thus began the great clash between two large oil producers that would result in massive casualties on both sides during the ensuing eight years. As with most Cold War conflicts, the world took sides. Islamic countries were split between supporting secular Islam, personified by Saddam, and fanatical Islam, personified by the Ayatollah. The superpowers supported Iraq officially, but assisted Iran clandestinely, perhaps most embarrassingly demonstrated by the Reagan Administration's secret sale of arms to Iran that secured funding for the U.S. intervention in Nicaragua.²⁵

By 1982, Iran had reversed the Iraqi invasion, restoring the border region. By 1984, Iran had driven into Iraq itself, secured the desert around Basra in the south, and cut Iraq off from the Persian Gulf. Desperate to restore the balance of the war and stem the gradual Iranian advance, Saddam employed chemical weapons against Iranian forces. These proved an effective method of offsetting the advantage of Iran's much larger troop numbers. A recently declassified 1983 State Department memo assessing Saddam's use of chemical weapons during this period and noting his personal order to employ chemical weapons, quotes Saddam as saying, "There is a weapon for every battle, and we have the weapon that will confront great numbers."²⁶

However, by the spring of 1987, Iran was also making significant advances in the north, which Saddam correctly ascribed to assistance from Iraqi Kurds. To deal with what was referred to in captured Iraqi documents as "the Kurdish problem," Saddam tasked his cousin Ali Hassan al-Majid, leader of the Ba'ath Party's northern bureau, with the job of eradicating all resistance, and granted him emergency powers to do so. Al-Majid then undertook a series of eight military campaigns against Kurdish "saboteurs" from 1987 to 1989. What began as a counterinsurgency during wartime ended in genocide, however. That the evidentiary trail so clearly tells the story is a rarity in the annals of human rights, and is indeed a story in itself.²⁷

After Saddam lost the first Gulf War in 1991, his beleaguered troops fell back under pressure from advancing forces led by Kurdish *peshmerga* militia fighters who were reinforced by Kurdish refugees returning from their cousins' homelands in neighboring Turkey and Iran. Although this liberation of northern Iraq would prove fleeting as the United States withdrew its support and allowed Saddam's forces to later return en masse to put down the uprising, international nongovernmental organizations

24. For a detailed account of the Iran-Iraq War, see generally STEPHEN C. PELLETIERE, *THE IRAN-IRAQ WAR* (1992).

25. Michael Dobbs, *U.S. Had Key Role in Iraq Buildup: Trade in Chemical Arms Allowed Despite Their Use on Iranians, Kurds*, WASH. POST, Dec. 30, 2002, at A1.

26. Memorandum from Jonathan Howe to Secretary of State Eagleburger, Iraqi Use of Chemical Weapons (Nov. 21, 1983), available at <http://www2.gwu.edu/~nsarchiv/NSAEBB/NSAEBB82/iraq25.pdf>.

27. McDOWALL, *supra* note 23, at 347-50 (1996).

seized the short window of opportunity to get into northern Iraq and disperse aid to the returning populations as well as collect valuable evidence on the genocide many believed had occurred there three years earlier.²⁸

Middle East Watch, a regional division of Human Rights Watch, teamed up with Physicians for Human Rights to survey the mass graves that were being uncovered by the locals. Over a ten-day period, several mass graves were exhumed near the Kurdish cities of Erbil and Suleimaniyeh. Large caches of Iraqi government and military records were also captured as hastily evacuated secret police buildings and government installations were stormed by advancing Kurds.²⁹

Peter Galbraith was dispatched by the U.S. Senate Foreign Relations Committee to broker a deal with the Kurds to secure the documents, as Saddam was preparing to retake the north. Custody was secured with the assistance of Middle East Watch, and, in 1992, fourteen tons of documents were transferred to the committee where they remain to date. These, together with the forensic findings of Physicians for Human Rights and interviews conducted by Middle East Watch with 350 Kurdish survivors and eyewitnesses of the genocide, form the basis of a 1993 report: *The Anfal Campaign against the Kurds*.³⁰

This report recounts the initial systematic bureaucratic groundwork laid by al-Majid for his conduct of what would later become known as “the Anfal”:

In the first three months after assuming his post as secretary general of the Ba’ath Party’s Northern Bureau, Ali Hassan al-Majid began the process of definition of the group that would be targeted by Anfal, and vastly expanded the range of repressive activities against all rural Kurds. He decreed that “saboteurs” would lose their property rights, suspended the legal rights of all the residents of prohibited villages, and began ordering the execution of first-degree relatives of “saboteurs” and of wounded civilians whose hostility to the regime had been determined by the intelligence services.

In June 1987, al-Majid issued two successive sets of standing orders that were to govern the conduct of the security forces through the Anfal campaign and beyond. These orders were based on the simple axiom on which the regime now operated: in the “prohibited” rural areas, all resident Kurds were coterminous with the *peshmerga* insurgents, and they would be dealt with accordingly.

The first of al-Majid’s directives bans all human existence in the prohibited areas, to be applied through a shoot-to-kill policy. The second, numbered SF/4008, dated June 20, 1987, modifies and expands upon these orders. It constitutes a bald incitement to mass murder, spelled out in the most chilling detail. In clause 4, army commanders are ordered “to carry out random bombardments, using artillery, helicopters and aircraft, at all times of the day or night, in order to kill the largest number of persons present in these prohibited zones.” In clause 5, al-Majid orders that, “All persons captured in those villages shall be detained and interrogated by the

28. See *Preface* to HUMAN RIGHTS WATCH report, *supra* note 20 (describing how the Human Rights Watch mission gathered evidence in Iraq).

29. *Id.*

30. HUMAN RIGHTS WATCH report, *supra* note 20.

security services and those between the ages of 15 and 70 shall be executed after any useful information has been obtained from them, of which we should be duly notified."

Even as this legal and bureaucratic structure was being set in place, the Iraqi regime became the first in history to attack its own civilian population with chemical weapons. On April 15, 1987, Iraqi aircraft dropped poison gas on the [Kurdistan Democratic Party] headquarters at Zewa Shkan, close to the Turkish border in Dohuk governorate, and the [Patriotic Union of Kurdistan] headquarters in the twin villages of Sergalou and Bergalou, in the governorate of Suleimaniyeh. The following afternoon, they dropped chemicals on the undefended civilian villages of Sheikh Wasan and Balisan, killing well over a hundred people, most of them women and children. Scores of other victims of the attack were abducted from their hospital beds in the city of Erbil, where they had been taken for treatment of their burns and blindness. They have never been seen again. These incidents were the first of at least forty documented chemical attacks on Kurdish targets over the succeeding eighteen months.³¹

Al-Majid employed a variety of chemical weapons during the Anfal campaign, including mustard gas—a blistering agent—and Sarin—a nerve agent known as GB. His penchant for this method of extermination earned him the sobriquet "Chemical Ali," a fearful reputation for brutality almost matching that of Saddam himself. Galbraith, who secured the documentary evidence for the Senate and later went on to become ambassador to Croatia, characterized al-Majid as the "Josef Mengele of [the Anfal] operation," referring to the Nazi doctor who carried out experiments on Jews.³² "It was a deadly experiment to see which of these weapons were the most effective."³³

One survivor of al-Majid's April 1987 chemical attacks on Kurdish villages in the Balisan valley described the effect of the pink, gray, and yellow gases drifting through the towns:

It was all dark, covered with darkness, we could not see anything It was like a fog. And then everyone became blind. Some vomited. Faces turned black; people experienced painful swellings under the arm, and women under their breasts. Later, a yellow watery discharge would ooze from the eyes and nose. Many of those who survived suffered severe vision disturbances, or total blindness for up to a month Some villagers ran into the mountains and died there. Others, who had been closer to the place of impact of the bombs, died where they stood.³⁴

All told, the Anfal campaign against the Kurds claimed between 50,000 and 100,000 lives by a conservative estimate. However, no single action accounts for all the casualties. There were multiple mass murders, multiple mass disappearances, forced displacement of hundreds of thousands of noncombatants, destruction of 2,000 villages that were classified in Iraqi government documents as "burned," "destroyed," "demol-

31. Introduction to HUMAN RIGHTS WATCH report, *supra* note 20.

32. *Chemical Ali: Alive and Held*, CBS NEWS, Aug. 21, 2003, <http://www.cbsnews.com/stories/2003/04/07/iraq/printable548099.shtml>.

33. *Id.*

34. See McDOWALL, *supra* note 23, at 353.

ished," or "purified," and the razing of a dozen larger Kurdish towns and administrative centers.³⁵

It is the deadly combination of methods employed against the Kurds during the eight Anfalls that intertwine to form the most complete picture of genocide. Although the successive gassings were perhaps the starkest examples, conventional killing by shooting accounted for equal numbers of deaths. For instance, the vast majority of Kurdish "detainees" were sent to the Iraqi army base at Kirkuk known as Topzawa. Here, they were registered and segregated. Adult and teenage males were then loaded onto closed trucks and taken to the execution grounds at places like Ramadi and Hatra, where they were lined up next to large pits and shot. Once the trenches were full, they were covered over.³⁶

The elderly were mostly bused to a concentration camp at Nuqra Salman in the Iraqi desert, where death rates averaged four to five per day from exposure and infection. The women and children went elsewhere. They were usually taken to Dibs, a camp close to the Kirkuk-Mosul highway, where many of the children succumbed to dysentery and malnutrition. About half of the women were taken to death pits like the one at Samawa.³⁷

Forced deportation, typically accompanied by the razing of villages, was also a common feature of the Anfalls. By the end of the campaigns, 1.5 million Kurds had been forcibly "resettled."³⁸ This was part of an overall scheme by Saddam to rearrange Kurdistan in northern Iraq, placing more key areas under Arab control. During this process, 60,000 Kurds fled into southeastern Turkey, exacerbating the refugee problems felt by the anxious government in Ankara at that time.³⁹

However, the gassing of Halabja was the single most horrific incident during this notorious campaign, accounting for about 5,000 of the Anfal deaths. Consequently, Halabja has become emblematic of the Kurdish genocide, much as Srebrenica has become so for the Bosnian genocide. Halabja had been captured in 1988 by rebel Iraqi Kurds with support from Iranian forces, and crushing the resistance there became an ultimate priority for Saddam. Since Halabja was a city of 70,000 people, it was not technically a target of the Anfal, but General al-Majid turned his attention to it along with his patently genocidal tactics.

According to a 2002 State Department report, al-Majid's coldly diabolical approach can be discerned from his methodology of extermination. Knowing that the gasses he intended to use were heavier than air and would thus sink, he opened the March 16, 1988, attack on Halabja with a conventional artillery bombardment for several hours, setting off the air raid sirens. This drove the local Kurdish population down into tunnels,

35. See *Introduction* to HUMAN RIGHTS WATCH report, *supra* note 20.

36. McDOWALL, *supra* note 23, at 359.

37. *Id.* at 360.

38. *Id.*

39. *Id.*; see also MICHAEL M. GUNTER, *THE KURDS OF IRAQ: TRAGEDY AND HOPE* 45 (1992).

cellars, and basements.⁴⁰

Those underground shelters became gas chambers as al-Majid unleashed his bombardment of poison. Aboveground, animals died and birds dropped out of trees. Belowground, humans met their end, trapped. Those who managed to scramble to the surface emerged into thick clouds of chemical gas:

Dead bodies—human and animal—littered the streets, huddled in doorways, slumped over the steering wheels of their cars. Survivors stumbled around, laughing hysterically, before collapsing Those who had been directly exposed to the gas found that their symptoms worsened as the night wore on. Many children died along the way and were abandoned where they fell.⁴¹

As photos of dead children crumpled on steps or lying contorted and bleached in the streets reached the world, an outcry arose from the human rights community. But the response from the international community of states was muted silence.⁴² None could offer much beyond platitudes, as they all had backed Saddam during the Iran-Iraq War with arms and financing. Indeed, Germany is widely considered to have been the industrial origin of the gas used by al-Majid during the Anfal campaign, and Kurdish leaders have long accused France, Italy, and the Netherlands of providing assistance to Saddam's chemical weapons program.⁴³

The United States was also implicated, as noted by James Tuite in his background note to a 1992 Senate Banking, Housing and Urban Affairs Committee staff report assessing the use of chemical weapons by Saddam against American troops in the first Gulf War:

[A]n inquiry was initiated by the Committee into the contributions that exports from the United States played in the weapons of mass destruction programs that have flourished under the direction of Iraqi President Saddam Hussein.

On October 27, 1992, the Committee on Banking, Housing and Urban Affairs held hearings that revealed that the United States had exported chemical, biological, nuclear, and missile-system equipment to Iraq that was converted to military use in Iraq's chemical, biological, and nuclear weapons

40. INT'L INFO. PROGRAMS, U.S. DEP'T OF STATE, Iraq: From Fear to Freedom 4 (Dec. 2002), available at <http://usinfo.state.gov/products/pubs/iraq/homepage.htm>.

41. McDOWALL, *supra* note 23, at 358. Agiza, who was eight years old and out in the fields when her village near Bahdinan was gassed, remembered seeing the planes come in and dropping the bombs. She recalled an experience similar to those recounted by survivors of Halabja:

It made smoke, yellowish-white smoke. It had a bad smell like DDT, the powder they kill insects with. It had a bitter taste I saw my parents fall down with my brother after the attack, and they told me they were dead. I looked at their skin and it was black and they weren't moving. And I was scared and crying and I did not know what to do. I saw their skin turn dark and blood coming out from their mouths and from their noses. I wanted to touch them but they stopped me and I started crying again.

Id. at 359.

42. *Id.* at 362.

43. *Id.* at 363.

program.⁴⁴

That Saddam possessed specific intent to commit genocide against the Kurds depends on the prosecution's ability to marshal its documentary and testimonial evidence. Perhaps such intent can be established if eyewitness testimony like the following can stand up to cross-examination:

[W]e monitored . . . radio communications between the political and military leadership Saddam Hussein briefed the assembled commanders that there would be a chemical attack on Halabja and that soldiers should wear protective clothing I heard a telephone conversation between Saddam Hussein and Ali Hassan al-Majid. Saddam ordered him to form a working group After the meeting Ali Hassan al-Majid returned to the area HQ Aerial pictures of Halabja after the attack were shown to Saddam Hussein and other members of the Revolutionary Command Council.

One of the President's bodyguards brought 30 prisoners out. They were Kurds. The President himself shot them one after another with a Browning pistol. Another 30 prisoners were brought and the process was repeated. Saddam Hussein was laughing and obviously enjoying himself. There was blood everywhere—it was like an abattoir Those who were still alive were eventually finished off by the security officers.⁴⁵

III. Genocide of the Marsh Arabs

The second genocide charge to be faced by Saddam involves the destruction of the Marsh Arabs. The Marsh Arabs are an ethnically and culturally unique group of Shi'a Arab tribes who have lived for five millennia in the swath of the Fertile Crescent, where the Tigris and Euphrates rivers meet in southern Mesopotamia (now Iraq) and create what was once the largest swampland in the Middle East. They are wholly dependent upon the marshlands for their sustenance and way of life, living in huts on mounds composed of dried marsh reeds, fishing, raising water buffalo, and traveling between settlements by boat along waterways that serve as streets.⁴⁶

The Sunni Arab Ba'athist regime in Baghdad, which had long distrusted the Marsh Arabs, began draining of the marshes in earnest during

44. U.S. SENATE COMMITTEE ON BANKING, HOUSING, AND URBAN AFFAIRS, U.S. CHEMICAL AND BIOLOGICAL EXPORTS TO IRAQ AND THEIR POSSIBLE IMPACT ON THE HEALTH CONSEQUENCES OF THE PERSIAN GULF WAR (1994), reprinted in 140 CONG. REC. S15045, S15047 (1994). For recently declassified primary sources acknowledging U.S. support of Iraq's chemical weapons program, see The National Security Archive, The Saddam Hussein Sourcebook (Dec. 18, 2003), <http://www2.gwu.edu/~nsarchiv/special/iraq/index.htm>. See also Dobbs, *supra* note 25, at A1 (referring to declassified government documents that evidence U.S. support for Iraq during the Iran-Iraq War).

45. INDICT, *Witness Statements, First Hand Accounts from Saddam's Brutal Regime*, available at <http://www.indict.org.uk/witnessdetails.php?target=Saddam> (last visited Apr. 24, 2005). INDICT, a London-based NGO, collected witness statements with support from the British Parliament and U.S. Congress.

46. Tim Cornwell, *Marshes Turned into Desert in an Act of Genocide*, THE SCOTSMAN, Sept. 24, 2002, at 12.

the Iran-Iraq war.⁴⁷ Seeking to offset Iranian military offenses in that region, the Iraqi regime constructed large earthworks in the drained land as defensive measures. Massive relocation efforts were undertaken, leading in some cases to the Marsh Arabs' physical destruction. One British reporter described the destruction of the group for the *Financial Times* in matter-of-fact terms:

In old photographs, grave men and boys stare out from delicately-arched, reed-thatched reception halls, or, mounted on their high-prowed boats, pole past water buffalo as they hunt wild boar and spear fish.

But the Marsh Arabs and their reception halls have now all but disappeared. Saddam Hussein's Ba'athist regime hounded the Ma'adan, as they are known, out of existence, ending a water-borne way of life that had not changed in 5,000 years.

The retribution visited on the Ma'adan by the Ba'athists forms one of the main charges of genocide leveled against Mr. Hussein and his associates.

"I was hung from a fan and tortured," says Qassim Alwan, sheikh of the al-Maarada tribe near the village of Dayr on the Shatt el-Arab waterway north of Basra

The Maarada were moved in the 1980s from their ancestral homelands, on what is now the Majnoon oil field, to a collection of single-storey brick houses standing in the desert. Majnoon was drained during the Iran-Iraq war, when the regime constructed a series of giant earthworks to counter an anticipated Iranian offensive.

"It took about two years. The water just stopped flowing in. Then the soldiers came and we were told to leave," Mr. Alwan says.

"They promised us electricity and water and schools but to this day we have nothing. These children cannot read or write," he says pointing to a group of barefoot boys.

Of the nearly 9,000 sq km of once permanent marsh and lake in the south of Iraq, the Ba'athist regime drained all but 10 percent, leaving nothing but uncultivated desolation. The aim, according to outside experts and Iraqis themselves, was purely political.

The population of the Marshes was put at 200,000 in 1991. Only 40,000 are now thought to be left—and only half of them are Ma'adan.

The rest have fled to Iran, have moved elsewhere in Iraq, or have been murdered by the regime. The Ma'adan, nearly all of whom were Shi'a, had a history of rebelliousness that put them directly at odds with Mr. Hussein.

. . . [T]he drainage programme gathered pace in the wake of the failed 1991 Shi'a uprising⁴⁸

Many of the Marsh Arab tribes supported the Basra-based Shi'a uprising following Saddam's defeat in the first Gulf War. Consequently, when Saddam was allowed to crush the insurrection with his remaining fire-power, the Marsh Arabs took their share of his fury. Napalm was loosed against them, and gas was dropped to poison the water and kill the wildlife

47. Emma Nicholson, *Case for Genocide: The Decimation of the Marsh Arabs*, available at <http://www.emmanicholson.org.uk/downloads/Case%20for%20Genocide%20-%20article.pdf> (last visited Sept. 16, 2005).

48. James Drummond, *A People Destroyed by Saddam Yearn for 5,000-Year-Old Way of Life*, *FINANCIAL TIMES* (London), Apr. 21, 2003, at 6.

in the marshes, thereby eliminating their food chain.⁴⁹ The villages of the most troublesome tribes were razed altogether.

The drainage project was accelerated after 1991. An Iraqi secret police cache captured by rebel Kurdish forces when they took Shaqlawa during their own uprising, contained documents titled "Plan of action for the marshes."⁵⁰ These documents laid out the blueprint for drainage of what was described as a haven for Iran-backed Shi'a rebels sowing ethnic and political dissent.⁵¹ Those who were not killed during the poisoning, drainage, and razing process, and who did not remain on the fifteen percent of marshland that survived, fled to neighboring Iran.⁵² Today, 95,000 Marsh Arabs exist in refugee camps along the Iranian border, relying exclusively on humanitarian aid handouts to survive.⁵³ Their homeland and way of life have been decimated to such an extent that they, as a distinct people, can be considered to have been "destroyed in part."⁵⁴

These acts were accompanied by an attempt on the part of Saddam's regime to dehumanize the Marsh Arabs, calling them "inferior and un-Iraqi monkey-faced people."⁵⁵ In addition to punishing the Marsh Arabs for their support of the uprising following the first Gulf War, Saddam also

49. David Orr, *Iraq "Poisons Marsh Arabs"; Mass Exodus into Iran as Saddam Assault Threatens to Destroy Habitat*, INDEPENDENT (London), Nov. 27, 1994, at 13.

50. Cornwell, *supra* note 46.

51. *Id.* Such findings were supported by a British team that visited the area in 1994: Mass poisoning has been added to Saddam Hussein's campaign of persecution against the Marsh Arabs in southern Iraq, according to a British governmental mission just returned from the region.

A team from the Overseas Development Administration (ODA), the first official aid organisation to visit the area in recent years, found evidence that the Marsh Arabs, much of whose ancient homeland has been drained by the Iraqi government, are being poisoned by chemicals put into their water supply by the authorities.

"I discovered symptoms of chronic long-term poisoning among many Iraqi women, young men and children," said Mukesh Kapila, a doctor who led the ODA mission to south-western Iran, where thousands of Iraqi refugees are seeking sanctuary. "I also saw scars from bullets which people said had been fired by Iraqi soldiers. There is no doubt that what is happening to the Marsh Arabs in Iraq amounts to genocide."

In recent years, up to half a million people are estimated to have fled the marshlands, the largest wetland ecosystem in the Middle East and home to the Marsh Arabs for nearly 5,000 years. According to an Exeter University report published this year, the marsh region—an area slightly smaller than Wales—will disappear within the next decade or so if the Iraqi government continues to drain it.

Already, between a half and three-quarters of the surface area has been drained

Orr, *supra* note 49, at 13.

52. Assisting Marsh Arabs and Refugees (AMAR) Appeal, *Humanitarian Activities: Iraq*, <http://www.amarappeal.com/iraq.php> (last visited Sept. 16, 2005).

53. *Id.*

54. Assisting Marsh Arabs and Refugees (AMAR) Appeal, *The Marsh Arabs and the Marshlands*, http://www.amarappeal.com/marsh_arabs.php (last visited Sept. 16, 2005).

55. Wilfred Thesiger, *Lords of the Lost Waters*, GUARDIAN (London), Sept. 10, 1992, at 21.

sought to move them off the oilfields under the marshes. The oil reserves in the now drained areas that were formerly covered with swampland are described as "vast" and "untapped."⁵⁶

Thus, while the immediate motive for such cruel persecutions were a combination of punishing for disloyalty and placing economic resources under greater control of the central government, those intentions could have evolved along the way to one of genocidal destruction of the group—an admittedly high bar for prosecution on this charge. Secretary of State Colin Powell referred to their persecution as "ethnic cleansing against the Shi'ite Iraqis and the Marsh Arabs, whose culture has flourished for more than a millennium."⁵⁷

The most persistent Western surrogate pressing for Saddam's prosecution on genocide charges for destruction of the Marsh Arabs is Baroness Emma Nicholson, British member of the European Parliament:

Evidence collected and reported during the last 20 years clearly shows that the actions taken by the Iraqi government against the Marsh Arabs constitute genocide. The international community, the coalition and/or the United Nations is therefore obligated to investigate and prosecute those responsible for this heinous crime.

Now that Saddam has been captured, there is a unique opportunity to bring those who committed this genocide to account.

....

The evidence shows that [the] Iraqi regime under Saddam Hussein carried out concerted and planned actions that targeted and destroyed the Marsh Arabs as a group: military attacks that killed and injured large numbers of civilians, and exhaustive draining of the Marshlands in order to create conditions in which the group could not survive. Consequently, the Marsh Arabs are on the verge of extinction, clearly victims of genocide.

In accordance with their obligations under international law, states must now ensure that the perpetrators of genocide against the Marsh Arabs, including Saddam, are brought to trial, and must give all assistance to the new authorities in Iraq for this to happen . . .⁵⁸

In response to a 1992 accusation of genocide against the Marsh Arabs, Iraq's parliamentary speaker Saadi Mehdi Saleh retorted, "America wiped the Red Indians off the face of the earth and nobody raised an eyebrow."⁵⁹ The parallel he was making refers implicitly to the nineteenth-century U.S.

56. Robert W. Gee, *Once Fertile Marshlands Have Become Parched Earth*, ATLANTA J.-CONST., May 12, 2003, at 4A.

57. Colin Powell, *Powell's Address, Presenting 'Deeply Troubling' Evidence on Iraq*, N.Y. TIMES, Feb. 6, 2003, at A18; Vasuki Nesiah, *From Berlin to Bonn to Baghdad: A Space for Infinite Justice*, 17 HARV. HUM. RTS. J. 75, 97 (2004) ("The treatment of the Kurds and Marsh Arabs in particular constituted violations of the Genocide Convention that warranted intervention.").

58. Nicholson, *supra* note 47.

59. Aaron Schwabach, *Ecocide and Genocide in Iraq: International Law, the Marsh Arabs, and Environmental Damage in Non-International Conflicts*, 15 COLO. J. INT'L ENVTL. L. & POL'Y 1, 8 (2004) (quoting JOHN FAWCETT & VICTOR TANNER, THE BROOKINGS INSTITUTION, SAIS PROJECT ON INTERNAL DISPLACEMENT, THE INTERNALLY DISPLACED PEOPLE OF IRAQ 32 (2002)).

government policy of eradicating the buffalo herds of the Great Plains, thereby decimating the Native American population in that area by subtracting its means of subsistence.⁶⁰ The marsh was a similar means of subsistence for the Marsh Arabs.

IV. Saddam's Downfall and Indictment

Saddam, once a friend and ally of the United States, forfeited that position when he invaded Kuwait in 1990, justifying his invasion as a forcible reincorporation of a renegade province. This strategic miscalculation cost him dearly. Saudi Arabia, the Arab states of the gulf, and the United States viewed Kuwait's occupation as a threat to the world's oil supply and surmised that his aggression would not stop with Kuwait. Thus, a coalition was formed and was duly blessed by the U.N. Security Council to invade Kuwait and repel the Iraqi army.

Although the coalition forces successfully repelled the Iraqis in January 1991, they stopped short of invading and occupying Iraq completely, which would have gone beyond the coalition's U.N. mandate of restoring Kuwaiti sovereignty. Subsequently, the United States and Britain jointly established "no-fly zones" in the north and south of Iraq that were patrolled over the ensuing decade by jet fighters and reconnaissance planes. These zones were created ostensibly to protect the Kurds in the north and the Shi'a in the south.⁶¹ The results were decidedly mixed.

America and the world were largely satisfied with this policy of containment coupled with economic sanctions imposed upon Saddam's regime to keep him weak and to defuse his ability to threaten his neighbors. After the terrorist attacks suffered by the United States on September 11, 2001, at the hands of Islamist Arab Osama bin Laden and his fundamentalist al-Qaeda network, the United States shifted its policy position with regard to terrorism from one of deterrence to one of preemption and active prevention.⁶² President Bush promised to hunt down terrorists wherever they were and bring down the regimes of states that harbored them. This policy was extended to include states pursuing development of weapons of mass destruction (WMD).⁶³

Based on what turned out to be faulty intelligence, the President was convinced that Saddam had retooled his ability to pursue WMD and was close to perfecting a nuclear weapon. Logically, containment could no longer work. With the backing of Congress, the President went to the United Nations and secured new resolutions to resume weapons inspec-

60. *Id.* at 8 n.36.

61. *No-fly Zones: The Legal Position*, BBC News, Feb. 19, 2001, http://news.bbc.co.uk/1/hi/world/middle_east/1175950.stm.

62. Judith Richards Hope & Edward N. Griffin, *The New Iraq: Revising Iraq's Commercial Law Is a Necessity for Foreign Direct Investment and the Reconstruction of Iraq's Decimated Economy*, 11 CARDOZO J. INT'L & COMP. L. 875, 881 (2004).

63. WHITE HOUSE, *THE NATIONAL SECURITY STRATEGY OF THE UNITED STATES OF AMERICA* 13-16 (Sept. 2002), available at www.whitehouse.gov/nsc/nss.html (last visited Apr. 20, 2005).

tions in Iraq to find and destroy that capability. Under Security Council Resolution 1441, Saddam produced 12,000 pages of documents disclosing his WMD programs. But this was rejected by both the United States and chief U.N. weapons inspector Hans Blix as incomplete.⁶⁴

Britain and the United States urged the Security Council to authorize military action for the noncompliance, but France, Germany, and Russia blocked such action until the inspectors could complete their work.⁶⁵ Fearful that such delay would allow Saddam another year to develop weapons, Britain and the United States formed a new coalition to invade Iraq and forcibly remove Saddam from power. Since a military campaign season in the desert cannot last into the summer heat, the coalition lost no time and dispatched ground forces, securing Baghdad in April 2003 after a lengthy bombing campaign.⁶⁶

The Coalition Provisional Authority (CPA) was established to govern Iraq during the occupation, and the military was redeployed throughout the country to hunt down the WMD and capture Saddam and other Ba'athist leaders, who had all fled Baghdad during the fighting. In December 2003, Saddam was captured where he was hiding outside of Tikrit. Taken into custody and held by coalition forces, he was accorded prisoner of war (POW) status as a military leader.⁶⁷

V. The Iraqi Special Tribunal

Even before Saddam's capture, the CPA and its adjunct Iraqi Governing Council were faced with the question of trial venues for captured war criminals. As the table below indicates, the trial options were many and varied, but one in particular presented itself as a method for retaining the most control over events while simultaneously conferring maximum legitimacy on the proceedings from the perspective of Iraqis—establishment of a domestic special tribunal.

A truth commission was never a realistic option, from either the domestic American or Iraqi political perspective. Retribution figures high on the list of criminal justice goals in both cultures and is reflected in their justice systems. Accordingly, taking the truth commission option would be viewed in both societies as "letting Saddam off the hook." Likewise, an international tribunal presented a false option due primarily to the fact that one would have to be created from scratch; moreover, the Bush administration has amply demonstrated its disdain for working with international bodies.

64. Hope & Griffin, *supra* note 62, at 882.

65. Ian Fisher, *Threats and Responses: Weapons Inspections; Top Iraqi Advisor Says He Believes War Is Inevitable*, N.Y. TIMES, Jan. 26, 2003, at A1.

66. Hope & Griffin, *supra* note 62, at 882.

67. John Hendren, *Pentagon Labels Hussein a POW, Conferring Him Special Rights*, L.A. TIMES, Jan. 10, 2004, at A1. For the criteria of prisoner of war status, see Jordan J. Paust, *Post-9/11 Overreaction and Fallacies Regarding War and Defense, Guantanamo, the Status of Persons, Treatment, Judicial Review of Detention, and Due Process in Military Commissions*, 79 NOTRE DAME L. REV. 1335, 1352 (2004).

Venue Option	Rationale/Accompanying Issues
Truth Commission	This option calls for no trial at all. South Africa successfully employed a truth and reconciliation commission that exchanged amnesty for criminal conduct for testimony and acknowledgement of acts committed in furtherance of Apartheid.
International Tribunal	<p>The U.N. Security Council would have to create an ad hoc International Iraqi War Crimes Tribunal. Currently, there is no international court that could hear Saddam's case. The International Court of Justice only has definitive jurisdiction over states; the new International Criminal Court only has prospective jurisdiction over crimes committed after July 2002; and the existing tribunals for Yugoslavia, Rwanda, and Sierra Leone only have jurisdiction over the criminal events that unfolded in those conflicts.</p> <p><u>Possible Models:</u></p> <ol style="list-style-type: none"> 1. Yugoslav Model: Purely international (location away from country of crime and int'l judges and prosecutors only). 2. Sierra Leone Model: Both international and domestic (location in country of crime and both international and domestic judges and prosecutors).
Military Tribunal	Under international law, the United States has the option to try Saddam before an American military tribunal. However, his status as a POW would bring all the protections of the Third Geneva Convention into play.
U.S. Federal Court	Just as Article III courts successfully tried Manuel Noriega after the American invasion of Panama, U.S. federal courts could conceivably try Saddam since genocide is criminalized by federal statute and the crime is accorded universal jurisdiction.
Special Iraqi Domestic Court	The IST was created by the Iraqi Governing Council to try war criminals such as Saddam. The IST would have jurisdiction over Saddam and his henchmen for genocide, war crimes, and crimes against humanity.

While the Pentagon is convening military tribunals to try captured al-Qaeda and Taliban in the U.S.-led war on terror, no Iraqis are specifically being singled out for trial by military commission. Saddam would be no exception. Such tribunals are regarded as necessarily operating in a vacuum—which Iraq, unlike Afghanistan, is not—and part of the stated goal for liberating Iraq was to reimpose it with democratic rule-of-law institutions. Thus, taking war crimes' trials away from the Iraqis would be seen as denying them the opportunity to let justice take its course within Iraq. The same justification would apply for not trying Saddam in American federal courts.

Yet another, perhaps more powerful reason for not trying Saddam in a military tribunal or a U.S. federal court is the perspective of the Arab street. From their vantage point rooted in the Arabic-Islamic honor code, it would be fine for Osama bin Laden to be tried in the United States because he struck the United States first. Saddam is another matter, however, because he was toppled from power after a full-scale invasion and occupation. From the Arab perspective, therefore, Saddam should be subjected to Arabic justice.

For these reasons, the domestically constituted IST was viewed as the most realistic venue option for trying Saddam. Promulgated just a few

days before his capture for trying the Ba'athist henchmen already arrested, the IST will consist of Iraqi judges and prosecutors dispensing Iraqi justice against Iraqi defendants. Although the statute establishing the IST carefully contains all the accoutrements that allow it to be described as domestic justice, international "guidance" is encouraged and, in some cases, required.

When the CPA drafted the statute of the IST, it specifically sought to avoid many of the problems associated with the Milošević trial in The Hague. A major difference is that the IST is a domestic Iraqi court that exists within the Iraqi judicial system under the authority of the Iraqi government. Article 1 of the statute limits the IST's temporal jurisdiction to crimes committed in Iraq or elsewhere between the Ba'athists' assumption of power on July 17, 1968, and their deposition on May 1, 2003. It specifically incorporates liability for crimes committed during the wars with Iran and Kuwait and for crimes committed against Iraqi ethnic or religious groups, whether during armed conflict or not. The IST has adjudicatory power only over people, not parties or corporate entities.⁶⁸

The IST's subject matter jurisdiction is limited as well. It can undertake prosecutions only for genocide, war crimes, crimes against humanity as defined largely by international law, and a small set of domestic Iraqi violations, including invading other Arab countries, wasting natural resources, abusing power, squandering public funds and assets, and attempting to manipulate the judiciary. Judges are appointed by the Iraqi government to trial chambers and a nine-member appellate body, which may include non-Iraqi nationals at the government's discretion. Provision is also made for creation of a twenty-member body of permanent "investigative judges," who will issue subpoenas, arrest warrants, and indictments, as well as collect and evaluate evidence, essentially building up the cases for the court.⁶⁹

Each investigative judge is a separate organ and independent from the tribunal judges. Interestingly, the chief investigative judge is required to appoint non-Iraqi foreign "advisors" to act in an assistant or observer capacity while also monitoring the work of the Iraqi investigative judges, to ensure that general due process standards are observed. Similarly, up to twenty prosecutors will be appointed by the government and be accompanied by international advisors who will monitor their work.⁷⁰

Whether these international advisors are drawn from other Arab states or Western countries could be a potential legitimacy issue for the tribunal. The least legitimacy would be accorded the IST if it incorporated U.S. military JAG officers as advisors. However, appointment of professional staff from the new International Criminal Court or other truly international judicial bodies would give greater legitimacy to the IST. Currently, the

68. Statute of the Iraqi Special Tribunal, Dec. 10, 2003, 43 I.L.M. 231, available at <http://iraq-ist.org/en/about/statute.htm>.

69. *Id.*

70. *Id.*

thirty-nine judges who have been appointed are considering hiring international law clerks to assist them in the trial and opinion-drafting process.

Borrowing from the statutes establishing the ICTY and ICTR, the statute of the IST also does away with the defenses of sovereign immunity and superior orders while building in the command responsibility logic for criminal liability. The new IST is also determined to learn from the mistakes of the Milošević trial in order to exercise better control over the defendant while still treating him fairly, impose counsel when necessary, limit the prosecution's introduction of evidence so as not to unduly prolong the trial, and so on.

Following his appointment as head of the IST in early 2004, Salem Chalabi led a delegation of Iraqi judges and prosecutors to The Hague in April 2004 to meet, over a period of three days, with jurists from the ICTY and the new International Criminal Court. Hoping to draw on their experiences, Chalabi said, "We do not want this tribunal to be the. . . ultimate historian of the atrocities of the previous regime. We want it to be about justice. And so we need to make sure the cases are properly prepared, that they're scrutinized appropriately, and the trials are fair. And this will take some time."⁷¹

During the spring of 2004, U.S. Department of Justice (DOJ) personnel began providing support to the new IST in the form of logistics and evidence collection. To this end, a DOJ Regime Crimes Liaison Office was established in Baghdad and was given a budget of \$75 million. The chief challenge faced by the staff attempting to marshal incriminating evidence is the deteriorating local security situation. For example, to exhume a mass grave—a process that takes two months, earth-moving equipment must be transported to the site, locals must be kept at bay, and a significant military contingent must be present around the clock, diverted away from other patrols and duties.⁷²

Gregory Kehoe, formerly a prosecutor with the ICTY, was put in charge of the DOJ extension office. Kehoe noted:

We are purely, again, in a support role as a liaison. What the problem in Iraq with the Saddam regime is that an infrastructure wasn't present to assist in these investigations. What we are attempting to do is gather information from various quarters, not only in the United States, but throughout the world, and provide the Iraqis with that information. And they then will develop that information through their investigative judges to decide what charges should be brought and against whom.⁷³

Notoriously unpredictable Iraqi politics have already taken their toll on the IST. Salem Chalabi was deposed as head of the tribunal in Septem-

71. Interview by Mary Lou Finley with Salem Chalabi, *As It Happens* (CBC radio broadcast Apr. 21, 2004).

72. Thanassis Cambanis, *Despite Allawi's Vow, U.S. Official Says Trial Won't Be This Year*, BOSTON GLOBE, Sept. 25, 2004, at A9.

73. Interview by Bill Hemmer with Gregory Kehoe, *American Morning* (CNN television broadcast May 12, 2004), transcript available at <http://cnnstudentnews.cnn.com/TRANSCRIPTS/040512/ltn.04.html> (last visited Sept. 16, 2005).

ber 2004 when murder charges were brought against him, even though the charges were later dropped, and was replaced by Amer Bakri. Chalabi contends that he was pushed aside for political reasons because his uncle, Ahmed—who runs the Iraqi National Congress and is a rival of the prime minister—fell out of favor with the United States after it became known that he was spying for Iran.⁷⁴

When it decided to create a domestic tribunal filled with Iraqi judges and prosecutors, the CPA may not have weighed the downside of the new IST being undermined by local politics. Then again, under intense political pressure from Washington to transfer sovereignty to Iraq on schedule at the end of June 2004, the CPA may not have had the time to consider all the alternatives fully.

High-level Iraqi judges who served during Saddam's reign have been excluded from serving, as have Iraqis who were in exile during that period. The judges who have been selected are typically low-level individuals, not deemed sufficiently Ba'athist to have owed any allegiance to Saddam. This in turn opens them up to challenge by the defense that they are not qualified to serve due to their lack of experience with crimes of genocide, aggression, war crimes, and crimes against humanity. Thus, the judges are undergoing a continuing training program that has taken them to Dubai and London.⁷⁵

At the end of June 2004, Saddam was stripped of his POW status, was transferred to the new Iraqi government, and was accorded the status of Iraqi criminal detainee.⁷⁶ As such, he was able to hire counsel before he underwent a formal arraignment hearing the next day, although his counsel were not present for the initial charging proceedings.

VI. Proving Genocide Against Saddam

When he was arraigned before an unidentified judge sitting for the IST, Saddam arrived in civilian clothes and chains, which were removed by his guards upon entering the courtroom. His indictment charges included genocide, crimes against humanity, war crimes, and aggression. Saddam was defiant during the hearing, refusing to sign the charges as directed by the judge.⁷⁷

Unlike Milošević who is acting as his own attorney at The Hague, Saddam will be represented by attorneys, possibly including Jacques Verges, a seventy-eight-year-old French criminal defense lawyer who famously represented Carlos the Jackal twenty years ago. Asked as to whether he would base a defense of Saddam on the complicity of western countries, Verges responded:

74. Cambanis, *supra* note 72.

75. Michael P. Scharf, *Can This Man Get a Fair Trial?*, WASH. POST, Dec. 19, 2004, at B1.

76. Charles Crain, *Saddam Is Placed under Iraqi Control*, ATLANTA J.-CONST., July 1, 2004, at A6.

77. *Defiant Saddam Rejects Court, Charges*, CNN.com, July 1, 2004, <http://www.cnn.com/2004/WORLD/meast/07/01/iraq.saddam/>.

During the Reagan administration. . . [Donald] Rumsfeld himself was in charge of some key relations with the Iraqi authorities Western countries sold weapons to Saddam. Western countries encouraged the war against Iran. Western countries were present in Iraq through diplomatic delegations. They weren't blind Obviously, in the course of a trial, the fundamental element will be: "you treat me like a pariah, but I was your friend. What we did, we did together. I fired the bullet, but you're the one who gave me the gun—you even pointed out the enemy."⁷⁸

It is evident from Verges's statement that the defense strategy will, like in Milošević's case, seek to apportion blame to the West. However, Saddam's version may actually admit that he is a monster and seek to pin accomplice liability on the West. One lawyer from his rather amorphous twenty-member defense team immediately sought to challenge the court's legitimacy by suggesting publicly that Saddam could not receive a fair trial before an Iraqi national tribunal. Instead, the lawyer demanded moving the case to an international tribunal because it involved international crimes.⁷⁹

Although another of Saddam's attorneys has argued that the Geneva Conventions prohibit an occupying power from dissolving domestic courts and creating its own, there is clear provision in the treaty for creation of military commissions that follow the strictures of due process.⁸⁰ Moreover, the CPA was careful to clothe creation of the IST as an extension of the Iraqi Governing Authority. Although that CPA-appointed body is close to the occupying power, it may not be close enough to support this aspect of the defense's challenge to the IST's legitimacy. In any case, the newly elected Iraqi assembly will likely bless the IST, extending its own representative legitimacy to the tribunal.⁸¹

The genocide charges will be individualized: One for the Kurds and one for the Marsh Arabs. The fact that Saddam brought up the subject of Halabja on his own during the arraignment⁸² indicates that the atrocity there weighs heavily on his mind. How balanced that mind is remains to be seen. At one point, Saddam, in a flash of paranoia, dismissed his arraignment as political "theatre" orchestrated by Bush to help him in his

78. Eric Pape and Marie Valla, *Defending Saddam*, NEWSWEEK WEB EXCLUSIVE, Dec. 30, 2003, available at <http://www.msnbc.msn.com/id/3840489/>.

79. *Saddam Trial Head Vows Justice*, BBC News, July 2, 2004, <http://news.bbc.co.uk/2/hi/middleeast/3859007.stm>.

80. For an argument that the United States, as an occupying power, has the responsibility under international law to restore law and order in Iraq, see Jordan J. Paust, *The U.S. as Occupying Power Over Portions of Iraq and Relevant Responsibilities Under the Laws of War*, ASIL INSIGHTS, Apr. 2003, <http://www.asil.org/insights/insigh102.htm>.

81. Argument of Curtis F. Doebbler in debate with Prof. Michael P. Scharf, *Can Saddam Hussein Receive a Fair Trial?* (C-SPAN television broadcast Jan. 30, 2005) (debate at Case Western Reserve School of Law on Jan. 13, 2005), transcript available at <http://www.cspanstore.org/shop/index.php?mainpage=productvideoinfo&productsid=184702-1>.

82. *Transcript of Saddam in Court*, MSNBC News, July 1, 2004, <http://www.msnbc.msn.com/id/5345118/>.

reelection campaign.⁸³

For the prosecution, the case for genocide of the Kurds will be much easier to make than the case for genocide of the Marsh Arabs. The Kurds are an ethnic group distinct from their Sunni Arab persecutors. They suffered from systematic persecution over a long period that included direct group killing, razing of villages, gassing of civilians, and internment in a network of camps and detention centers controlled from a central bureaucracy that orchestrated this destruction at the national, regional, and local levels. The portion of the genocide definition implicated here is "destroyed in whole or in part."

The case for genocide of the Marsh Arabs is more tenuous, however. The Marsh Arabs are a cultural and religious group also distinct from their Sunni Arab persecutors, but their partial destruction was the result of a more indirect method—draining the marshes on which they relied for subsistence. The portion of the genocide definition implicated here is "deliberately inflicting on the group conditions of life calculated to bring about its physical destruction in whole or in part." Moreover, documentary evidence of coordinated state policy to commit genocide against the Marsh Arabs is not as abundant as the evidence that will be used to support the Kurdish genocide charge. Consequently, the case of the Marsh Arabs will be the weaker of the two genocide indictments if the prosecution decides to label it genocide instead of a crime against humanity.

Typically, proof that genocide occurred is easier to produce than proof of intent to commit the crime. Prosecutors will show physical acts that characterize genocide with abundant witness testimony, documentary evidence, and increasing physical evidence as mass graves continue to be unearthed. For instance, when the Anfal campaign was unfolding, the U.S. Senate recognized it as genocide, as recounted by then-chair of the Foreign Relations Committee, Claiborne Pell, speaking at a 1992 hearing:

It was just 4 years ago that I introduced, and the Senate passed, legislation imposing comprehensive financial and economic sanctions against Iraq.

Our legislation was entitled "The Prevention of Genocide Act of 1988." In the relevant part, the act said the Iraqi army has undertaken a campaign to depopulate the Kurdish regions of Iraq by destroying Kurdish villages in much of northern Iraq and by killing the civilian population.

Iraq's campaign against the Kurdish people appeared to constitute an act of genocide. At the time, both the Reagan administration and the House conferees vehemently objected to characterizing Iraqi conduct in Kurdistan as genocide. We now know that that description was very apt.

In 1987, Iraq initiated a campaign to depopulate Iraqi Kurdistan. The military operation, code named the Al-Anfal campaign, encompassed the systematic destruction of every village in Kurdistan, the massive use of chemical weapons against defenseless villagers, and the deportation and execution of tens of thousands of men, women, and children.

In all, at least 180,000 people died in the Al-Anfal campaign; about 5 percent of the population of Iraqi Kurdistan. Had the gulf war not inter-

83. *In Court, Saddam Says Bush Is "the Criminal"*, MSNBC NEWS, July 1, 2004, <http://www.msnbc.msn.com/id/5323918>.

vened, it is likely that Iraq's Kurdish population would have been exterminated.

There was, in 1987 and 1988, clear evidence of Iraq's conduct. In 1987, the Foreign Relations Committee published a staff report revealing the systematic destruction of Kurdish villages. In 1988, our committee published another staff report documenting the extent of use of chemical weapons against Kurdish civilians.

That report, which is the only published American Government documentation on the actual use of chemical weapons since World War I, described Iraqi actions as having many of the characteristics of genocide. It also described the machinegun killing of Kurdish civilians and burials in mass graves.⁸⁴

Beyond proving that the acts constituted genocide, the prosecution must prove the mental element—the specific intent on the part of the perpetrators that destruction of the target population was the goal. As in the Milošević trial, the toughest hurdle for the prosecution to overcome will be proving Saddam's specific intent. Saddam's lawyers will not make this job easy; they will argue alternative multiple intents. With respect to the genocide of the Kurds, Saddam will argue that it was never his intent to destroy them. Rather, his primary intent was to impose greater central control over the oilfields underlying traditionally populated Kurdish areas in the north, and his secondary intent to combat Kurdish forces assisting Iran during the Iran-Iraq War.

For proof of the primary intent, Saddam will point to national security concerns associated with allowing a restive, potentially breakaway population to remain in control of the country's largest oil reserves. He will argue that his draconian forced migration policies were geared to this end, and that to the extent that large numbers of Kurds died, it was because they resisted. To break this resistance, harsh methods like use of concentration camps and gas had to be employed—but not to kill them as a group, only to frighten them into compliance.

In fact, the economic security theme is one that is likely to recur as a defense. Saddam's attorneys may use it as an underlying point, not only to escape conviction for the Kurdish genocide, but also to escape conviction for the Marsh Arab genocide and for the war crimes, aggression, and crimes against humanity charges in connection with the occupation of Kuwait. If the defense attorneys can convince the judge that Saddam's intent was to secure Iraq's economic wealth by invading Kuwait and depopulating the Kurdish and Marsh Arab areas—thereby securing the oilfields in all three—then the prosecution's showing of intent becomes much harder. The prosecutor has to not only show the requisite evil intent, but also demonstrate that the alternative intent is not plausible.

For proof of the secondary intent, namely, the intent to combat Kurdish forces assisting Iran in its war against Iraq, Saddam will produce evidence of collusion between Kurdish and Iranian forces during the

84. *Mass Killings in Iraq: Hearing before the S. Comm. on Foreign Relations*, 102d Cong. 1 (1992) (statement of Claiborne Pell, Chairman).

Iran-Iraq War. He will argue that fighting the Iranians and fighting the Iraqi Kurds were one and the same thing from the Iraqi perspective. That Kurdish forces took Halabja in 1988 with support from Iranian forces as they crossed into northern Iraq legitimized the attack by Iraqi forces on that city as a military necessity. Saddam will contend that while it was unfortunate that 5,000 Iraqi Kurds died during combat, his intent was not to kill civilians outright but to retake a strategically important area.

To escape conviction for the Marsh Arab genocide, Saddam will reiterate the economic angle and add that in addition to securing the oil wealth in the south, he was ferreting out Iranian sympathizers—a process that was begun during the Iran-Iraq War with the establishment of defensive positions in the marsh areas.

The prosecution must blunt these alternative intent theories. Geography helps them to undermine the secondary alternative intent theory for the Anfal campaign—that Saddam was combating Kurds colluding with Iranian forces during wartime. The majority of Kurdish villages gassed or destroyed during the Anfals were either on the border with Turkey, not Iran, or some distance inland from the Iranian border where most of the military incursions were taking place.⁸⁵ Moreover, those targeted by the Anfals were civilians, not military forces or armed Kurds.

The prosecution may choose to admit the logic of counterinsurgency as the underlying idea for creation of the Anfal and to argue that the counterinsurgency nonetheless evolved into genocide. As one genocide researcher for Human Rights Watch notes, “the fact that Anfal was, by the narrowest definition, a counterinsurgency, does nothing to diminish the fact that it was also an act of genocide. There is nothing mutually exclusive about counterinsurgency and genocide. Indeed, one may be the instrument used to consummate the other.”⁸⁶

The economic rationale of the primary alternative intent theory is harder to attack, but with some reverse engineering the prosecution may be able to undermine it as well. For example, in a damning quote drawn from one of many audio tapes captured by the United States and translated by the Canadian Broadcasting Corporation (CBC), al-Majid discusses the Anfals: “Tell him I will strike. I will strike with chemicals and kill them all. What is the international community going to say? The hell with them and the hell with any other country in the world that objects.”⁸⁷ If that evident genocidal intent can be imputed back up the chain to Saddam, then Saddam’s alternative explanations may collapse.

The prosecution will be helped considerably by the fact that so many survivors of Saddam’s genocidal policies are volunteering to present evidence against him. In relation to the attack on Halabja, a female student at

85. Saeedpour, *supra* note 16, at 66.

86. George Black, *Report on al-Anfal*, in *THE SADDAM HUSSEIN READER* 189, 199 (Turi Munthe ed., 2002).

87. *The Fifth Estate—The Forgotten People: The Attack at Halabja* (CBC News broadcast Mar. 26, 2003), available at <http://www.cbc.ca/fifth/kurds/attack.html> (last visited Apr. 24, 2005).

that time was rounded up with other students and paraded before Saddam at military headquarters in Suleimaniyah. She saw him on a green telephone and heard him distinctly give the order to bombard the city. "I would like to testify that I saw him make that phone call that day. I think the matter has come alive again, and now we will see justice." An Arab Iraqi from Baghdad who witnessed planes loaded with "unusual" weapons at the Arbil airfield that morning wants to tell his story in court as well.⁸⁸

Lack of knowledge is another defense Saddam will raise—which also goes to the establishment of specific intent. As Milošević has done, Saddam will claim that he was unaware of the activities of his subordinates. This defense may fail, however, if the prosecution properly asserts the command responsibility doctrine that imputes knowledge up the chain of command to leaders who reasonably should have known what was happening. The *tu quoque* ("you too") defense was rejected at Nuremberg and at the ICTY in the Milošević case.⁸⁹ To the extent that this defense is raised to a genocide charge, it will involve the United States and the West's supplying him the means and assistance to carry out his actions. It will lose its force on a domestic tribunal, however, and an argument that Iran used chemical weapons first—which is itself disputed—would similarly be lost on an Iraqi court.

Saddam's attorneys have indicated their intention to raise the sovereign immunity defense.⁹⁰ Even though it has eroded significantly in international law, it may yet retain some salience in domestic law. To succeed, however, his attorneys acknowledge that they would have to show that the American-led invasion of Iraq was illegal under international law, and therefore, by extension, Saddam is still legally the head of state. This strategy is of course based on political bias and rather murky assertions:

Arab lawyers representing deposed Iraqi dictator Saddam Hussein plan to appeal to UN Secretary-General Kofi Annan to take action to end their client's "illegal detention" and bring him back to power.

Annan's recent declaration that the liberation of Iraq by the US-led coalition was "illegal" has been welcomed by Saddam's lawyers, who believe the secretary-general should make "the necessary moves" to restore their client as president of Iraq.

"It is now clear that the occupation. . . lacks any legal, ethical, or religious authority," says Hussein Megalli, president of the Jordanian Bar Associ-

88. Nicolas Rothwell, *Town's "Justice" Awaits Saddam*, AUSTRALIAN, July 22, 2004, at 7.

89. Sienho Yee, *The Tu Quoque Argument as a Defense to International Crimes, Prosecution or Punishment*, 3 CHINESE J. INT'L L. 87, 102-113, 117-123 (2004). The International Military Tribunal at Nuremberg did, in fact, allow consideration of *tu quoque* in the mitigation of Admiral Dönitz' sentence on the charge of conducting unrestricted submarine warfare—a practice in which the Allies had also engaged, *supra*. Saddam's lawyers may also try to use this defense to avoid or blunt a charge of aggression for the invasion of Kuwait, arguing that the American-led invasion of Iraq was a clear-cut case of aggression.

90. Interview by Fran Kelly with Giovanni di Stefano, Saddam's attorney (ABC radio broadcast July 1, 2004), transcript available at <http://www.abc.net.au/am/content/2004/s1144472.htm>.

ation and one of Saddam's lawyers. "Saddam is still the legitimate president of Iraq and cannot be tried by an illegal body."

....

Saddam's lawyers say that since Annan implicitly recognizes Saddam as head of the Iraqi state, the logical next step for the UN is to seek measures to "efface the traces of American aggression."

The lawyers are not clear as to what form Annan's intervention to secure Saddam's release should take. But they point to the precedents of Haiti and Sierra Leone when the UN intervened to restore "illegally deposed presidents" to power.⁹¹

Putting the American-led invasion on trial is certainly a clever approach that would shore up the ancillary illegitimacy charge against the IST. Such a politically charged position is an uphill battle, however, and it is unlikely to establish that Saddam is the current legal president of Iraq even though the method used to depose him was illegal.

Finally, it remains indeterminate exactly who will be on Saddam's defense team and which attorneys will physically represent him before the IST. Many have come forward, and there are conflicting accounts that some, such as Jacques Verges, were retained by Saddam's nephew, while others were retained by his wife's family. American lawyers Curtis Doebler and Ramsey Clark, as well as many prominent Arab attorneys, have made representations that they are on Saddam's defense team. Consequently, any coherent strategy depends largely upon who will proceed as counsel.

Nevertheless, a flurry of activity has been undertaken on Saddam's behalf. For example, British human rights lawyer Clive Stafford Smith published a brief intended to bring Saddam's case within the domestic U.S. court system so as to ensure his basic rights to a fair trial, competent representation, and independent judges and juries. Arguing that the IST's creation by the United States and appointment by the interim government were illegitimate, Stafford Smith contends, "We want to approach this in as many ways as possible to show that the [United States] was behind the process This will help prove the lack of legitimacy of the process, as well as the bias in it."⁹²

Conclusion

For the myriad foregoing reasons, such as internal defense squabbling, tribunal and security stabilization, prosecutorial evidence collection, and prosecutorial strategic advantages in establishing damning facts with the IST during the trials of Saddam's henchmen, Saddam's trial is still far away from beginning. Indeed, Mouwafak al-Rubaie, the Iraqi National Security Advisor, told the press recently that Saddam's trial would not begin until

91. Amir Taheri, *Put Saddam on Trial - Now*, JERUSALEM POST, Oct. 1, 2004, at 16.

92. Robert Winnett, *Saddam Bids to Challenge Case in U.S.*, SUNDAY TIMES (London), Dec. 19, 2004, at 2.

early 2006, citing the need to "get it right."⁹³

To be sure, many have an interest in getting it right, not the least of which include the United States and its coalition, the new Iraqi government, and nascent Iraqi legal community. There is every indication that the IST is determined to learn from the mistakes of the ICTY in the trial of Milošević as well as the experience of other tribunals that have tried other prickly former leaders, all of whom naturally attempted to corrupt the proceedings against them.

Muzzling a defendant's political speech-making while simultaneously offering him the chance to mount a vigorous defense is a balance that must be struck in theory for the sake of the trial's legitimacy, but one that has proven difficult to attain in practice. Hermann Goering, Nazi Germany's Reichmarschall, was the first high-ranking government official to face justice for crimes amounting to genocide in 1945. Because the International Military Tribunal allowed him wide latitude in answering Justice Robert Jackson's cross-examination, Goering got the better of the prosecution. Indeed, without being muzzled, he was almost able to push the Nuremberg trial of leading Nazi figures off its tracks.

Aware of this danger, the presiding judge at the Tokyo trial of leading Imperial Japanese figures restricted the testimony of Prime Minister Hideki Tojo beyond his opening statement to yes-or-no answers without the possibility of elaboration. Over fifty years later, however, the international tribunal hearing Milošević's case made the same mistake as the Nuremberg tribunal with Goering. Milošević's speech-making and political posturing literally ruptured the normal trial schedule and allowed his case to extend over three years.

Saddam Hussein has shown the same proclivity as other captured leaders, trying to seize control of judicial proceedings at his first court appearance in 2004 with several attempts to lecture the judge, coupled with repeated attacks against the legitimacy of the court. However, the presiding judge truncated this possibility, promising him more time to testify at his actual trial instead of at the arraignment.

Former dictators and members of their elite governing group tended to rise to power and maintain it through a deadly combination of innate persuasive charisma, unorthodox political insight, and raw brutality. Consequently, it should come as no surprise that when these former leaders are presented with a new platform via the witness stand, they naturally attempt to use it to their advantage—taking control of the proceedings to the extent that they are allowed to do so. The unfortunate result can be that the western democratic notion of a party's "day in court" becomes permission to disrupt the judicial process.

In the case of Milošević, the tribunal's decision to allow him to proceed as his own lawyer during the prosecution's case, combined with direct television coverage of the trial in Serbia, led to the creation of an image

93. Associated Press, *Saddam No Closer to Trial One Year After Being Captured*, THE RECORD (Ontario), Dec. 13, 2004, at A5.

back in Belgrade of a man being persecuted, instead of prosecuted, by the international system. Serbs responded to this, buying into Milošević's political rehabilitation of his reputation by electing him *in absentia* to parliament in the spring 2004 elections.

Such process issues are, at bottom, concerned with balance. Balance is critical in order for the trials, and resulting convictions, to be accepted as legitimate. However, legitimacy remains in the eye of the beholder. And institutional calculations designed to foster a greater perception of legitimacy are sometimes more accurate than others, subject to the individual circumstances of each tribunal. The legitimacy of the IST, both internationally and locally, depends to a large extent on perceptions of its fairness, thoroughness, transparency, and success in completing trials on a reasonable schedule.

While he waits, Saddam has much time for reflection. He continues his gardening in the courtyard adjacent to his cell, where American military forces continue to function as his jailors. The world continues to wonder what will happen to him. Who knows how tall the little tree that he tends will grow until he learns his fate? The Iraqi Minister for Human Rights, Bakhtiar Amin, finds this bizarrely ironic:

This is a man who committed some of the biggest acts of ecocide in history, when he drained the marshes in southern Iraq, used chemical weapons against 250 Kurdish villages, and shipped whole palm tree plantations to the charlatan leaders of the Arab world who were his shoeshine boys. And now he's a gardener.⁹⁴

94. John F. Burns, *For Hussein, a Spartan Life at His Former Palace*, N.Y. TIMES, Sept. 19, 2004, at A1 (quoting Bakhtiar Amin).